SUPREME COURT, U. S.

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In the Supreme Court Of the United States

OCTOBER TERM, 1975
No. 75-603

M.C. MANUFACTURING COMPANY, INC. and
UNIVERSAL AUTOMATIC MACHINES, INC.
Petitioners

vs.

TEXAS FOUNDRIES, INC.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CIVIL APPEALS OF TEXAS,
9TH SUPREME JUDICIAL DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

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OBJECTION TO JURISDICTION

Respondent asserts that this Court is without jurisdiction to consider this petition by virtue of petitioners' failure to timely file their petition for a writ of certiorari in accordance with Title 28 U.S.C. Section 2101, which requires:

> "(c)...any writ of certiorari intended to bring any judgment or decree in any civil action, suit or proceeding before the Supreme Court for

> review shall be taken or applied for within ninety days after the entry of such judgment or decree."

Rule 506 of the Texas Rules of Civil Procedure makes clear when a judgment of the Supreme Court of Texas is final:

> "The judgment of the Supreme Court shall be final at the expiration of fifteen days from the rendition thereof, when no motion for rehearing has been filed."

It is well established in Texas case law, that the overruling of a motion for rehearing by the Supreme Court of Texas constitutes the entry of a final judgment. *Rittenberry v. Capitol Hotel Co.,* 69 S.W.2d 491 (Tex. Civ. App.-Amarillo, 1934, writ ref'd); *Brown, et al v. Linkenhoger,* 153 S.W.2d 342 (Tex. Civ. App.-El Paso 1941, writ ref'd w.o.m.).

Thus it is clear that the requisite ninety day period is computed from the date of the final judgment and not from the date of the Court of Civil Appeals' "ministerial act" of issuing the mandate which the Supreme Court of Texas had directed. *Department of Banking, State of Nebraska v. Pink,* 317 U.S. 264 (1942).

Since petitioners' motion for rehearing before the Supreme Court of Texas was overruled on July 9, 1975, the ninety day period within which to file its petition for writ of certiorari ended on October 7, 1975. Petitioners, however, did not file their petition in this Court until October 21, 1975, two weeks late.

Petitioners cite the case of *Commissioner of Internal Revenue v. Estate of Edward T. Bedford,* 325 U.S. 283

(1945) to support their position that the ninety day period begins to run from the "order of mandate" rather than the overruling of the motion for rehearing by the Supreme Court of Texas. However, this Court made it quite clear that its holding in the *Bedford* case was an exception to the general rule and applied only to petitions for writ of certiorari from the United States Court of Appeals for the Second Circuit, since in that Circuit only, the "order of mandate" serves the function of an entry of judgment and is not just a "ministerial act."

REASONS FOR DENYING THE WRIT

This case involves no important or novel question of law but only the question whether an action in personam for debt in a Texas State Court is barred by a Federal procedural rule, Rule 13(a) of the Federal Rules of Civil Procedure, where such action may be a compulsory counterclaim to an anti-trust action in Federal Court.

Prior decisions by this Court and other Federal and State Courts have clearly established in regard to Rule 13(a), the Federal Courts will not interfere with state court actions where in personam judgments are sought, *Penn General Casualty Co. v. Commonwealth of Pennsylvania,* 294 U.S. 189 (1935), and that state courts are free to proceed with their separate litigation without reference to the proceedings in any other court. *Sessions Company v. W.A. Sheaffer Pen Company,* 344 S.W.2d 180 (Tex. Civ. App.-Dallas 1961, writ ref'd n.r.e.), *Byrd-Frost, Inc. v. Elder,* 93 F.2d 30 (5th Cir.

1937).

The Court of Civil Appeals of Texas, Ninth Supreme Judicial District, clearly followed the applicable decisions of this Court and other Federal Courts in rendering its opinion in the case now before the Court (Petition, p. A4). In that opinion, the Court of Civil Appeals of Texas followed the case of *Reines Distributors, Inc. v. Admiral Corporation,* 182 F. Supp. 226 (S.D.N.Y. 1960) and quoted from it appropriately. In that case Reines sued Admiral Corporation in Federal Court claiming "alleged illegal price discrimination in violation of the Anti-Trust laws." That is what petitioners alleged in their Federal Court suit against respondent. Subsequently, Admiral Corporation commenced 41 separate actions in New York State Court against Reines on notes and trade acceptances made by Reines to Admiral "and on open account between the parties." This is what respondent did in this suit brought in the State Court on open account between the parties. Reines moved in the State Court for a stay of the counterclaims in Federal Court, but the New York State Courts refused to stay the Federal Court action. (See 182 F. Supp. at 227, citing 9 A.D.2d 410, 194 N.Y.S.2d 932). Reines then moved in Federal Court for an order enjoining Admiral from further prosecuting the State Court suit on the notes and open accounts. The holding in the *Reines* case was that the Federal Court has no power to interfere with the State Court proceedings. Thus, in accordance with the law of comity, both Courts acted as sister courts, and neither would interfere with the other, nor abate its own proceedings.

The *Reines* case was cited and followed in *L.F.*

Dommerich & Company v. Bress, 280 F. Supp. 590 (D.N.J., 1968) which case was also followed and cited by the Court of Civil Appeals of Texas in its opinion (Petition, p. A5). The Court of Civil Appeals also cited the cases of *Red Top Trucking Corporation v. Seaboard Freight Lines,* 35 F. Supp. 740 (S.D.N.Y. 1940) and *Fantecchi v. Gross,* 158 F. Supp. 684 (E.D. Pa 1957). In both of these cases the effect of Rule 13(a) was discussed, and it was held that the Federal Courts will not enjoin a State Court action under these circumstances.

The cases cited and followed by the Court of Civil Appeals of Texas demonstrate that in actions *in personam* a Federal Court will not enjoin the progress of a State Court, and a State Court will not enjoin the progress of a Federal Court, even where the suits involve the very same subject matter. While petitioners in this case are not asking one court to restrain another, they are asking the State Court to bar its own action because an allegedly similar suit is pending in Federal Court. The same reason that prevents restraint of the sister court defeats a plea in abatement or bar. Each court is free to proceed without regard to the other. There is no impediment to prevent proceeding to a decision.

The Court of Civil Appeals of Texas also cited the case of *Sessions Company v. W.A. Sheaffer Pen Co.,* supra, where that Court ruled a plea in abatement, similar to petitioners' plea in bar herein, stating at Page 184 that:

> "Finally, there is no merit to defendant's contention that the State Court should have abated the instant suit pending a trial for treble

damages action pending in the Federal Court. It has long been recognized that the State Court is free to proceed in its own way and in its own time without reference to the proceedings in any other court. 1 Tex. Jur. 2d 37; Byrd-Frost, Inc. v. Elder 5 Cir., 93 F. 2d 30, 115 ALR 342; Bergholm v. Peoria Life Ins. Co., Tex. Civ. App. 1933, 63 S.W.2d 1064."

Thus, the Court of Civil Appeals of Texas clearly applied the applicable decisions of this Court and other Federal Courts in rendering its decision that petitioners' plea in bar should be overruled. The question of law presented herein has long been settled and is not one meriting this Court's attention.

CONCLUSION

For the foregoing reasons the Petition should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on the day of November, 1975, a true copy of the foregoing Brief for Respondent in Opposition was mailed by United States Mail to Mr. Don Stokes, P.O. Box 547, Marshall, Texas 75670, attorney for petitioner.